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No. 687

In the Supreme Court of the United States

OCTOBER TERM, 1961

A. CHENEY GREENE AND EVELINA S. GREENE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 29–34) is reported at 296 F. 2d 841. The order of the District Court (R. 67a–71a)[1] is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 35–36) was entered on December 5, 1961. The petition for certiorari was filed on January 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Record references are to Petitioners' Appendix in the court below.

QUESTION PRESENTED

Whether the District Court erred in denying, without a hearing, petitioner's motion for the return and suppression as evidence of records alleged to have been obtained illegally by a Treasury agent in the course of an income tax investigation.

RULE INVOLVED

Federal Rules of Criminal Procedure:

Rule 41. SEARCH AND SEIZURE

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor

did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On November 23, 1960, petitioners moved the United States District Court for the Western District of New York, under Rule 41(e), Federal Rules of Criminal Procedure, for an order suppressing as evidence, directing the return of, and restraining the Government from using in any criminal proceeding, certain papers and records allegedly obtained illegally by a special agent of the Internal Revenue Service in the course of an investigation. Petitioners requested a hearing for the purpose of taking testimony on issues of fact raised by the motion. (R. 2a–4a.) The motion, as amplified by petitioners' accompanying affidavits (R. 5a–49a), alleged in substance that the agent obtained the evidence by fraud and trick in that petitioners were never advised that the investigation might lead to criminal prosecution but to the contrary were given to understand that the object of the investigation was to ascertain their correct civil tax liability; and that the evidence was further tainted with illegality in that petitioners were never expressly advised of their constitutional privileges against self-incrimination and the right to counsel. In reply the Government filed the affidavit of the special agent who made the investigation and obtained the evidence in question. (R. 52a–66a.) The District Court, on the basis of the affidavits and oral argument, entered its order denying the motion. (R. 67a–71a.)

The affidavits revealed the following undisputed state of facts:

On or about November 12, 1959, Vincent J. Carbone, a special agent of the Internal Revenue Service employed at Buffalo, New York, visited petitioners' home near Westfield, New York, but found no one there.[2] (R. 52a.) Carbone left an official card announcing his visit and bearing his name and title. (R. 7a, 52a–53a, 58a–59a.) On November 18, 1959, Carbone, together with Special Agent Becker, made a return visit, and found petitioner A. Cheney Greene at home. (R. 7a, 53a.) Carbone identified himself and his position on meeting petitioner (R. 8a, 53a), but did not explain the nature of his duties with the Intelligence Division. (R. 8a–11a.)

During the interview, Carbone asked for and was given certain information relating to petitioners' previous income tax returns and their financial status. (R. 8a–9a, 53a.) It was agreed at the conclusion of the conference that petitioners would provide records for purposes of the agent's investigation for the years 1957 and 1958.[3] (R. 9a, 53a–54a.) After the agents departed, petitioner, on that same evening, spoke to a friend named Jim Carstarter who "did some accounting work on tax returns" (R. 10a), and Mr. Carstarter advised petitioner that he "get all

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[2] Petitioners' counsel after oral argument in the Court of Appeals, filed an affidavit with that Court indicating that the agent's investigation originated with an informer's statement to the Internal Revenue Service concerning alleged tax evasion by petitioners. (Pet. App. 24–28.)

[3] Subsequently the period was expanded to include the years 1955 and 1956. (R. 16a.)

the papers from [his] wife [who was then in Florida] and bring them up to him, [Carstarter] and see what needs to be done." (R. 10a.) Acting on this advice, and on the "advice of others" (R. 15a), petitioner flew to Florida, got the papers from his wife, and turned them over to Carstarter. (R. 10a, 15a.) In a letter of November 30, 1959, petitioner advised Carbone that he would file amended returns for the years 1957 and 1958. (R. 10a, 15a.) Shortly thereafter, these amended returns were filed, the 1958 return showing approximately $6,000 more dividend income than had originally been reported. (R. 57a, 61a–62a, 64a.)

On December 21, 1959, Carbone, not having received the records requested, wrote to petitioners indicating that his investigation could not be completed "until an audit" of these records had been made. (R. 16a.) In another letter of February 1, 1960, Carbone stated that he wished "to audit" the records. (R. 20a.) Various communications from petitioner to Carbone during this period indicated that the records would be ready for audit in March or April. (R. 18a, 59a–61a.) The records were mailed by petitioners on March 1, 1960, and were received by the Internal Revenue Service on March 4, 1960. (R. 21a–23a, 37a.)

On April 20, 1960, Carbone wrote to petitioners requesting them to appear at his office "[i]n order that additional information can be secured." (R. 24a.) At this meeting, which took place on April 25, 1961,

some fifty days after petitioners had turned over their records, the following incident occurred (R. 12a):

> Before the questions began, Mr. Carbone asked us if we would mind if he had a tape recorder plugged in to take down the questions and the answers. To this I replied as best I can remember, something like this: "Just a minute, how serious is this thing. I have been up and above board with you and helped you guys all I could. Now are you going to be up and above board with me and tell me what kind of a mess I am in. Do I need an attorney?" As best as I can remember, Mr. Carbone replied something like this: "That is not for me to say. You have friends and you can talk to them."

The possibility of a criminal proceeding was first mentioned to petitioners in a letter from the Internal Revenue Service dated June 2, 1960. (R. 13a–30a.) Shortly thereafter, petitioners consulted and retained counsel. (R. 13a.)

The District Court, after hearing oral argument, denied the motion to suppress since the undisputed facts revealed that Special Agent Carbone had practiced no deception; that he had not misled petitioners into believing that the investigation would be limited to civil penalties; that the records were turned over "voluntarily and understandably" by the petitioners (R. 69a–70a); and that on the affidavits presented, there was "no substantial issue of fact requiring a hearing." (R. 71a.)

The Court of Appeals affirmed, holding that (Pet. App. 31, 32):

> We agree that there was no issue which required a hearing and that, on the affidavits before it, the district court reached the only possible conclusion, that there had been no overreaching or invasion of petitioners' rights and that they had turned over their records freely. * * * There was no error in denying the Greenes a hearing on their motion, since they had no ground for complaint even if all the facts alleged in their affidavit were true.

The Court of Appeals, which was critical of the delays in the proceedings in the District Court, refused to stay the presentation of the evidence to a grand jury by the United States Attorney. However, the government agreed not to take any action, pending decision on the present petition, other than the filing of a complaint before a United States Commissioner to toll the running of the statute of limitations on a possible charge of wilful evasion for the year 1955.[4] The complaint was filed during the present month, and, under the applicable statute (26 U.S.C. 6531), the statute of limitations was thereby extended, as to 1955, for a period of nine months (until November, 1962).

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[4] Upon the government's agreement to that effect, Mr. Justice Harlan denied an application by petitioners for an order staying the government from presenting the evidence to a grand jury pending disposition of the petition.

ARGUMENT

Whether or not the dismissal of the motion to suppress was technically a "final" order for purposes of appeal,[5] there is no merit in petitioners' contention (Pet. 10–16) that the District Court erred in denying the motion to suppress without hearing testimony. The argument is based on the proposition that special agents who secure the consent of a taxpayer to examination of his books, having as their purpose an investigation for possible criminal violations, are guilty of deceit unless they divulge their purpose, and that the taxpayer must be warned at the inception of the investigation of his constitutional rights against self-incrimination and the right to counsel. Petitioners' contention, unsupported by any citation of authority, is directly contrary to the settled law which requires only that the information be voluntarily and understandingly given by the taxpayer, and that criminal investigators, and special agents in particular,[6] are under no duty to explain that criminal proceedings are the intended object of their investigation, or to warn the taxpayer in advance of the constitutional privilege. *Wilson* v. *United States*, 162 U.S. 613,

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[5] See *DiBella* v. *United States*, No. 21, and *Grant* v. *United States*, No. 297, this Term.

[6] The Intelligence Division of the Internal Revenue Service conducts investigations of possible criminal violations of the revenue laws. The great majority of these are resolved by informal inquiry. Thus, of 14,237 preliminary investigations begun in the fiscal year 1959, only 3,969 became full scale investigations, and only 1,026 were referred for prosecution. See Annual Report, Commissioner of Internal Revenue, 1959, pp. 14, 21.

621–624; *Powers* v. *United States*, 223 U.S. 303, 312–314; *United States* v. *Achilli*, 234 F. 2d 797, 805 (C.A. 7th), affirmed on other issues, 353 U.S. 373; *Grant* v. *United States*, 291 F. 2d 227, and 282 F. 2d 165, 170 (C.A. 2d); *Russo* v. *United States*, 241 F. 2d 285 (C.A. 2d), certiorari denied, 355 U.S. 816; *Turner* v. *United States*, 222 F. 2d 926, 930–932 (C.A. 4th), certiorari denied, 350 U.S. 831. As the Court of Appeals for the Second Circuit said in *United States* v. *Sclafani*, 265 F. 2d 408, 414–415, certiorari denied, 360 U.S. 918:

> A "routine" tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.

See also *United States* v. *Frank*, 245 F. 2d 284, 285–286 (C.A. 3d), certiorari denied, 355 U.S. 819; *Scanlon* v. *United States*, 223 F. 2d 382, 385 (C.A. 1st); *Montgomery* v. *United States*, 203 F. 2d 887, 892–893 (C.A. 5th); *Hanson* v. *United States*, 186 F. 2d 61, 64–66 (C.A. 8th); *Lisansky* v. *United States*, 31 F. 2d 846, 851 (C.A. 4th), certiorari denied, 279 U.S. 873.

Petitioners argue that the records turned over by them to special agent Carbone were not voluntarily or understandingly given since they were obtained by fraud under the guise of an examination for civil purposes when in fact a criminal investigation was being conducted. (Pet. 11.) But, as the courts be-

low held, the disclosures were voluntarily made by petitioners, and there was no misrepresentation on the part of Agent Carbone. (R. 69a–70a; Pet. App. 31–32.) Moreover, sufficient warning of a possible criminal prosecution was here present. The agents made no attempt to hide their official identity or the official purpose of their business. (R. 7a, 8a, 53a, 58a–59a). As the Court of Appeals observed (Pet. App. 32):

> Here the agents involved in the investigation did nothing to obscure the implicit warning that any information or records they might obtain might be used in a criminal prosecution. Stating that they were conducting an "audit" surely did not exclude the possibility that they might find discrepancies to be willful so as to require consideration of criminal proceedings. * * *

Furthermore, as mentioned by the lower court (R. 69a), petitioner A. Cheney Greene was so "sufficiently apprised of the government's concern" that he consulted a part-time accountant the same day as his initial interview (R. 10a), flew to Florida shortly thereafter to obtain the records from his wife (R. 10a, 15a), obtained "advice from others" (R. 15a), and caused the preparation and filing of amended returns (R. 10a).

In light of the uncontroverted facts revealed by the affidavits, it is readily apparent that petitioners have no support for their assertion (Pet. 10–13, 18) that Rule 41(e), Federal Rules of Criminal Procedure as interpreted in *Austin* v. *United States* (C.A.

4th), decided November 21, 1961 (62-1 U.S.T.C., par. 9122), required that a hearing be held. *Austin* appears to be a special case in which the Court of Appeals, while specifically refusing to decide that the allegations of the petition were (as a matter of law) sufficient to justify a suppression order, nevertheless felt that the circumstances were doubtful enough to call for a hearing.[7] The court, in the last sentence of the opinion, noted that no hearing would have been required had the allegations clearly shown that, even if true, no relief would have been granted. This is the situation in the instant case, and the asserted conflict of decisions simply does not exist.

Petitioners' claim (Pet. 16–19) that the special agent was required to use the statutory summons procedure under Section 7602, Internal Revenue Code of 1954, is without substance. Aside from the fact that the statute itself merely authorizes, and does not compel, the use of the summons procedure, it is again clear that the only relevant inquiry is whether the records were voluntarily turned over without inducement by fraud or deceit. *Perlman* v. *United States*, 247 U.S. 7; *United States* v. *Foley*, 283 F. 2d 582 (C.A. 2d); *Grant* v. *United States*, *supra*; *Hanson* v. *United States*, *supra*.

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[7] In *Austin*, there were, for example, allegations of coercive conduct on the part of the investigating agents.

CONCLUSION

Further review by this Court is unwarranted. No conflict of decisions or important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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